112

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARINE FORESTS SOCIETY and
RODOLPHE STREICHENBERGER,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state appellate court violate due process by denying a request for supplemental briefing or rehearing of a highly fact bound issue raised *sua sponte* by the court during oral argument and then relied upon to decide the case?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are petitioners Marine Forests Society and its founder and President Rodolphe Streichenberger (Marine Forests) and the respondent California Coastal Commission (Coastal Commission).

Petitioner Marine Forests is a nonprofit corporation whose purpose is to conduct experimental research on creating new or replacing lost marine habitat. *Marine Forests Society v. California Coastal Commission,* 128 Cal. Rptr. 2d 869, 874 (2002), *previously published* at 104 Cal. App. 4th 1232 (hereinafter *Marine Forests I*).

The respondent California Coastal Commission is a California state agency created by the California Coastal Act of 1976 (Coastal Act). The Coastal Act is a lengthy and comprehensive statute aimed at protecting the coastal zone. The Coastal Commission is the entity responsible for implementing the Coastal Act. *Marine Forests Society I,* 128 Cal. Rptr. 2d at 872.

CORPORATE DISCLOSURE STATEMENT

Petitioner Marine Forests Society is a nonprofit corporation. As a nonprofit corporation, the Marine Forests Society has no parent corporation or stock owned by any publicly held company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AT ISSUE AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Procedural Background	3
B. Factual Background	6
REASONS FOR GRANTING THE PETITION	10
I. THE CALIFORNIA COURTS HAVE INCORRECTLY DECIDED A FEDERAL QUESTION OF PROCEDURAL DUE PROCESS BY DENYING A PETITION FOR SUPPLEMENTAL BRIEFING OR REHEARING ON A HIGHLY FACT BOUND ISSUE RAISED *SUA SPONTE* BY THE COURT OF APPEAL AT ORAL ARGUMENT AND RELIED UPON TO DECIDE THE CASE	11
A. Due Process Requires That Decisions Made on Highly Fact Bound Issues Accommodate, at a Minimum, Briefing And Argument on Those Issues	11

TABLE OF CONTENTS – Continued

Page

B. Due Process Prohibits Courts From Using the Present Case To Create New Law and Then Apply That New Law Retroactively to the Same Case 13

C. Errors Result From Decisions Made on *Sua Sponte* Issues Without Supplemental Briefing and Argument 16

II. THE SUBJECT DECISIONS OF THE CALIFORNIA COURTS CONFLICT WITH RELEVANT DECISIONS OF THIS COURT FOR ENSURING PROCEDURAL DUE PROCESS IN DECISIONS MADE ON *SUA SPONTE* ISSUES 21

A. The Relevant Decisions of This Court Indicate That Due Process Demands Supplemental Briefing on Dispositive *Sua Sponte* Issues 21

B. This Court Has a History of Declining Consideration of Issues Not Properly Raised or, Alternatively, Requesting Supplemental Briefing To Satisfy Due Process 23

C. Where This Court *Has* Decided a Case Based on an Unbriefed *Sua Sponte* Issue, Strong Dissenting Opinions Have Always Argued That Procedural Due Process Demanded More 28

TABLE OF CONTENTS – Continued

Page

III. THE SUBJECT DECISIONS OF THE CALIFORNIA COURTS AND OTHER STATE COURTS CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS 30

A. The United States Courts of Appeals Remand the Case or Request Supplemental Briefing and Argument on Dispositive Issues Raised *Sua Sponte* 30

B. The United States Courts of Appeals Conflict With the State Supreme Courts Which Do Not Uniformly Remand or Request Supplemental Briefing on Dispositive *Sua Sponte* Issues 32

CONCLUSION 35

APPENDIX

A: California Court of Appeal's Denial of Plaintiffs' "Request to Submit Supplemental Briefing or, in the Alternative, for a Rehearing" Filed March 24, 2008 .....App. 1

B: California Trial Court's Order Denying Motion for Reconsideration Of Order On Motion For Attorney Fees and Granting In Part Plaintiffs' Motion For Award of Reasonable Attorneys' Fees Filed May 1, 2006 .App. 2

C: California Supreme Court's Denial of Petition for Review Filed June 11, 2008.....App. 21

D: Senate Committee On Judiciary, SB 2321, 1985-1986 Regular Session .....App. 22

TABLE OF AUTHORITIES

Page

CASES

Allied-Signal, Inc. v. Director, Division of Taxation, 503 U.S. 928 (1992) 26

Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) 16

Bartus v. Wisconsin Department of Health and Social Services, 501 N.W.2d 419 (Wis. 1993) 34

Beecher v. Labor & Industry Review Commission, 682 N.W.2d 29 (Wis. 2004).....35

Bjornestad v. Hulse, 229 Cal. App. 3d 1568 (Cal. Ct. App. 1991).....7

Bloomer v. Gibson, 912 A.2d 424 (Vt. 2006) 32, 33

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001).....24, 28, 30

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930).....*passim*

Brown v. Board of Education of Topeka, 345 U.S. 972 (1953).....26, 27, 28, 30

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).....27, 28, 30

Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).....26, 27, 28, 30

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001) 13, 18, 20

TABLE OF AUTHORITIES – Continued

Page

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978) 12

City of Janesville v. CC Midwest, Inc., 734 N.W.2d 428 (Wis. 2007) 35

Cohens v. State of Virginia, 19 U.S. 264 (1821) 17

Dickerson v. United States, 530 U.S. 428 (2000) 26, 28, 30, 31

Doggett v. United States, 502 U.S. 976 (1991) 26

Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) 28

Girouard v. United States, 328 U.S. 61 (1946) 18

Graham v. DaimlerChrysler Corp., 34 Cal. 4th 553 (Cal. 2004) 18, 30

Greenberg v. Comerica Bank, 229 F.3d 1163 (10th Cir. Aug. 18, 2000) 16

Greenlaw v. United States, 128 S. Ct. 2559 (2008) 20

Greer v. Miller, 483 U.S. 756 (1987) 29

Gustafson v. Alloyd Company, 512 U.S. 1280 (1994) 26

Haji v. Prevention Ins. Agency, Inc., 492 N.W.2d 460 (Mich. Ct. App. 1992) 33

Hall Street Associates, L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008) 26

Jackson v. Benson, 647 N.W.2d 815 (Wis. 2002) 35

TABLE OF AUTHORITIES – Continued

Page

Kee v. City of Rowlett, Texas, 247 F.3d 206 (5th Cir. 2001) 31

Kolstad v. American Dental Association, 527 U.S. 526 (1999) 24, 29

Kuhai v. INS, 199 F.3d 909 (7th Cir. 1999) 31

Ladner v. United States, 358 U.S. 169 (1958) ... 23, 24, 30

Lani v. McDaniel, 23 Fed. Appx. 644 (9th Cir. 2001) 30

Mack v. City of Detroit, 654 N.W.2d 563 (Mich. 2002) 14, 33, 34

Mapp v. Ohio, 367 U.S. 643 (1961) 29

Marine Forests Society v. California Coastal Commission, 128 Cal. Rptr. 2d 869 (Cal. Ct. App. 2002) ..... ii, 3

Marine Forests Society v. California Coastal Commission, 160 Cal. App. 4th 867 (Cal. Ct. App. 2008) ..... *passim*

Maurin v. Hall, 682 N.W.2d 866 (Wis. 2004) 35

Mentor H/S, Inc. v. Medical Device Alliance, Inc., 244 F.3d 1365 (Fed. Cir. 2001) 31

Miranda v. Arizona, 384 U.S. 436 (1966) 27

Monell v. Department of Social Services, 436 U.S. 658 (1978) 17, 18, 30

Monroe v. Pape, 365 U.S. 167 (1961) 17, 30

Nelson v. Adams USA, Inc., 529 U.S. 460 (2000) 13, 14, 21, 22, 23

TABLE OF AUTHORITIES – Continued

Page

Patterson v. McLean Credit Union, 485 U.S. 617 (1988) 26

People v. Castro, 38 Cal. 3d 301 (Cal. 1985) 15

People v. Dillon, 34 Cal. 3d 441 (Cal. 1983) 15

Poyner v. Loftus, 694 A.2d 69 (D.C. Cir. 1997) 16

Providence Journal Company v. Providence Newspaper Guild, 271 F.3d 16 (1st Cir. 2001) 31

Prudential Insurance Company of America v. Athmer, 178 F.3d 473 (7th Cir. 1999) 32

Reno v. Bossier Parish School Board, 527 U.S. 1033 (1999) 26

Roberts v. Galen of Virginia, Inc., 525 U.S. 249 (1999) 24

Sagaser v. McCarthy, 176 Cal. App. 3d 288 (Cal. Ct. App. 1986) 12, 19

Shaboon v. Duncan, 252 F.3d 722 (5th Cir. 2001) 31

Slack v. McDaniel, 529 U.S. 473 (2000) 26

Small v. United States, 544 U.S. 385 (2005) 29

Smith v. Roper, 12 Fed. Appx. 393 (7th Cir. 2001) 31

Snider v. Melindez, 199 F.3d 108 (2d Cir. 1999) 16, 30

South Central Bell Telephone Company v. Alabama, 526 U.S. 160 (1999) 24

State v. Harvey, 647 N.W.2d 189 (Wis. 2002) 35

TABLE OF AUTHORITIES – Continued.

Page

State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners, 875 N.E.2d 59 (Ohio 2007) 14, 34

State of Washington v. Aho, 975 P.2d 512 (Wash. 1999) 32

Swift v. Tyson, 41 U.S. 1 (1842) 29

Swint v. Chambers County Commissioner, 513 U.S. 958 (1994) 26

Thomas v. Crosby, 371 F.3d 782 (11th Cir. 2004) 31

Trest v. Cain, 522 U.S. 87 (1997) 22

United States v. Burke, 504 U.S. 229 (1992) 19

United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) 27, 31

United States v. McHan, 11 Fed. Appx. 304 (4th Cir. 2001) 30

United States v. Young, 266 F.3d 468 (6th Cir. 2001) 31

United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439 (1993) 21, 22, 31

University of the District of Columbia Faculty Association v. District of Columbia Financial Responsibility Mgmt. Assistance Auth., 163 F.3d 616 (D.C. Cir. 1998) 30

Vermont Agency of National Resources v. United States, 528 U.S. 1044 (1999) 26

TABLE OF AUTHORITIES – Continued

Page

Walsh v. International Longshoremen's Association, 630 F.2d 864 (1st Cir. 1980).....32

Wolf v. Colorado, 338 U.S. 25 (1949).....29

CONSTITUTION

U.S. Const. amend. I 29

U.S. Const. amend. V 2, 12, 28

U.S. Const. amend. XIV 2, 12, 28

STATUTES

18 U.S.C. § 3501 .....27, 28

28 U.S.C. § 1257 1

Cal. Code Civ. Proc. § 1021.5.....*passim*

Cal. Govt. Code § 68081 .....3, 13, 15, 18, 32

Cal. Pub. Resources Code § 30312 4

OTHER AUTHORITIES

Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245 (2001-2002).....12, 16, 27, 33

B.E. Witkin, *Manual on Appellate Court Opinions* § 85 (1977) 26

TABLE OF AUTHORITIES – Continued

Page

Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 San Diego L. Rev. 1253 (2002) 26

Roger J. Traynor, *Badlands in An Appellate Judge's Realm of Reason*, 7 Utah L. Rev. 157 (1960) 26

Sarah M.R. Cravens, *Involved Appellate Judging*, 88 Marq. L. Rev. 251 (2004-2005) 11, 12, 21, 33

State of California Resources Agency, Enrolled Bill Report, A. 2003, 2nd Ex. Sess. 4, 8, 19

RULES

Wash. Rule 12.1(b) App. Proc. 32

OPINIONS BELOW

The California Supreme Court denied, without opinion, the Petition for Review on June 11, 2008 as case number S162531. This denial appears as Appendix (hereinafter App.) C to this petition. This denial also is reported along with the Third Appellate District Court of Appeal's opinion at *Marine Forests Society v. California Coastal Commission*, 160 Cal. App. 4th 867 (Cal. Ct. App. 2008) (hereinafter *Marine Forests II*). In this opinion, the Court of Appeal reversed the superior court's award of attorneys' fees.

The Third Appellate District Court of Appeal denied, without opinion, petitioners' "Request to Submit Supplemental Briefing or, in the Alternative, Petition for a Rehearing" on March 24, 2008 as case number C052872. This denial appears as App. A to this petition.

The Superior Court of the State of California, County of Sacramento, ordered an award of attorneys' fees on May 1, 2006 in Case No. 00AS00567. A copy of this order is attached as App. B to this petition.

JURISDICTION

The California Supreme Court issued its final judgment on June 11, 2008. App. C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AT ISSUE AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

Section 1021.5 of the California Code of Civil Procedure provides:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which

> case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

Section 68081 of the California Government Code provides:

> Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

STATEMENT OF THE CASE

A. Procedural Background

On December 30, 2002, the Court of Appeal of the State of California, Third Appellate District, affirmed a judgment that the California State Legislature had the ability to exert "unfettered power" over the Coastal Commission, an executive agency, and thereby violated the separation of powers. *Marine Forests Society I,* 128 Cal. Rptr. 2d at 882. The California Legislature met in an extraordinary session in February 2003, passing Assembly Bill 1xx to amend

California Public Resources Code section 30312 to correct the separation of powers problem. State of California Resources Agency, Enrolled Bill Report, A. 2003, 2nd Ex. Sess., at 1. The Coastal Commission supported AB1xx and "recommend[ed] that the Governor SIGN AB1xx." *Id.* at 2.

On May 1, 2006, the Superior Court of the State of California, County of Sacramento, awarded attorneys' fees to Marine Forests in the amount of $176,811.75 pursuant to California Code of Civil Procedure section 1021.5, *supra*. App. at 19. The court found this amount "reasonable for services performed in the appellate courts in vindicating the California Constitution's requirement of separation of powers so that one branch of government does not seize and exercise the powers of a co-equal branch." App. at 20. The Court also noted that "[i]n order for a litigant raising such issues to be successful, he or she must overcome the natural reluctance of the courts to upset the status quo, and convince the judges who hear the matter that the way that a governmental agency has always been constituted should be declared unconstitutional." App. at 18.

The respondent Coastal Commission appealed this award in the Court of Appeal of the State of California, Third Appellate District. *Marine Forests Society II,* 160 Cal. App. 4th 867. The Court held oral argument on February 26, 2008. Reporter's Transcript of Oral Argument (Feb. 26, 2008), *Marine Forests Society v. California Coastal Commission*, 160 Cal. App. 4th 867 (Mar. 4, 2008) (No. C052872)

(hereinafter Reporter's Transcript). At oral argument, Presiding Justice Scotland raised an issue not before proposed or briefed by either party. That issue was whether the Legislature's participation in changing the law to correct the separation of powers problem mooted the issue of whether the Coastal Commission changed its behavior to the same end:

> **Justice Scotland**: So it was the legislature that essentially changed its position, not the commission. And I suppose if you read *Graham v. DaimlerChrysler*, the argument could be made that Marine Forests can't succeed on the catalyst theory because the defendant never . . . the lawsuit didn't cause the defendant to change its position in any way beneficial to Marine Forests.
>
> **Lisa Trankley**: Well, to be honest, I really hadn't looked at it that way. But I think that's right in the sense that the catalyst theory assumes that the defendant took action, usually in the form of a settlement. In this situation where the legislature amended the statute, it's arguable that it is impossible to recover on a catalyst theory where the defendant doesn't make the change, where the outside body does.

Reporter's Transcript, *supra*, at 10:6-21.

On March 4, 2008, the court of appeal reversed the attorneys' fees award. *Marine Forests Society II*, 160 Cal. App. 4th 867. The court of appeal reasoned, based on the issue above raised *sua sponte*, that

"despite the fact that this lawsuit was the catalyst for a change in the law, the catalyst theory for a section 1021.5 attorney award does not apply because it was the Legislature, not the Commission, that changed its behavior as a result of this lawsuit." *Id.* at 871.

On March 18, 2008, Marine Forests made a request to the Court of Appeal for supplemental briefing or, in the alternative, a rehearing. Brief for Appellant entitled: "Request to Submit Supplemental Briefing or, in the Alternative, Petition for a Rehearing" (Mar. 18, 2008), *Marine Forests Society II* (No. C052872) (hereinafter Request for Supplemental Briefing or Rehearing). The Court of Appeal denied this request on March 24, 2008. App. at 1.

On April 9, 2008, Marine Forests petitioned the California Supreme Court for review. Plaintiffs' and Appellants' Petition for Review, *Marine Forests II*, 160 Cal. App. 4th 867 (No. S162531). The California Supreme Court denied the petition for review on June 11, 2008. App. at 21.

B. Factual Background

After the oral argument on February 26, 2008 wherein the Court of Appeal, Third Appellate District raised the issue *sua sponte* of the effect of the Legislature's corrective action on the respondent Coastal Commission's behavior, there was no opportunity for supplemental briefing and argument on that dispositive issue. There was no opportunity to discover, brief, and argue the Coastal Commission's encouragement or participation in the change in the law or its actions vis-à-vis the Legislature's actions.

In the Coastal Commission's April 30, 2008 Answer to Marine Forests' Petition for Review to the California Supreme Court, it contended that the issue of the Legislature's role in the outcome of the litigation was not a dispositive one, but rather mere dictum. *See* Respondents' Answer to Appellants' Petition for Review, *Marine Forests II*, 160 Cal. App. 4th 867 (No. S162531). To the contrary, the court of appeal held that "the catalyst theory for a section 1021.5 attorney award does not apply because it was the Legislature, not the Commission, that changed its behavior as a result of this lawsuit." *Marine Forests II*, 160 Cal. App. 4th at 871.

The court of appeal continued to discuss whether Marine Forests had obtained the primary relief sought, but did so on the foundation established *sua sponte* that the Legislature, not the Commission, was the relevant actor. The court of appeal also acknowledged that legislative changes, as occurred here, may constitute the primary relief sought. *Marine Forests II,* 160 Cal. App. 4th at 880, citing *Bjornestad v. Hulse*, 229 Cal. App. 3d 1568, 1598 (Cal. Ct. App. 1991). The first element of the catalyst theory of attorney fees is that "the lawsuit was a catalyst motivating *the defendants* to provide the primary relief sought." *Marine Forests II,* 160 Cal. App. 4th at 877 (emphasis added). The court of appeal's decision that it was the Legislature, not the defendant Coastal Commission, which had changed its behavior, is not mere dictum. It is a holding which disposed of the case. Further, whether the legislative change satisfied Marine Forests is yet another of the issues raised

and decided *sua sponte*. Request for Supplemental Briefing or Rehearing at 4.

The legislative history of the new law shows that "[t]he California Coastal Commission recommends that the Governor SIGN AB1xx." State of California Resources Agency, Enrolled Bill Report, A. 2003, 2nd Ex. Sess. at 2. Since the issue of the Legislature's actions mooting the change in behavior by the Coastal Commission had never been raised by the parties, this aspect of the legislative history was never briefed or argued so as to fully address that issue. Never briefed or argued was the extent of the Coastal Commission's involvement in supporting and effectuating the change in law. Nor briefed or argued was the extent of the Coastal Commission's participation in restructuring itself after the bill became law.

In the March 18, 2008 Request for Supplemental Briefing or Rehearing, five *sua sponte* issues were identified on which the parties had no opportunity to offer briefing or argument.[1] A rehearing or

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[1] The March 18, 2008 Request for Supplemental Briefing or Rehearing identified the following five unbriefed issues addressed by the court of appeal:

1. "Whether it was the Legislature and not the California Coastal Commission (Commission) that 'changed its behavior' as a result of this lawsuit."
2. Whether an argument that the Coastal Commission changed its behavior must be made *only* to the California Supreme Court.
3. Whether Marine Forests' victories before the Superior Court and the Court of Appeal were decided *on the merits*.

(Continued on following page)

supplemental briefing and argument are necessary on all five issues.

All five issues are alive. However, for the purpose of brevity, only the first and most important issue – whether the Legislature's actions subsequent to the litigation mooted any change in behavior by the defendant Coastal Commission – is discussed in this petition. Of this issue, Marine Forests stated:

> It will be shown that the Commission provided key support for the corrective legislation *only after* this action was initiated and this Court had issued its decision on the merits. Thus the Commission *changed its behavior*. The Commission never proposed or briefed [the issue of whether the Legislature's actions mooted that change in behavior.] Therefore, it was not addressed in Marine Forest Society's briefs.

Request for Supplemental Briefing or Rehearing at 2 (emphasis added). Petitioners' request being denied, petitioners had no notice and no opportunity to brief what became a dispositive issue. Petitioners had no notice or opportunity to defend against the conclusion

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4. Whether the trial court sufficiently addressed the *Graham* standard.

5. Whether the legislative change *satisfied* Marine Forests.

Petitioners believe the first of these five issues is the most significant and have thus chosen to use it as the reference point for discussion of the procedural due process violations by the Court of Appeal, Third Appellate District and the California Supreme Court throughout this petition.

that the Legislature's actions somehow mooted the changes in behavior by the Coastal Commission.

The court of appeal revealed its *sua sponte* issue resolution and decision making in one sentence: "Thus, despite the fact that this lawsuit was the catalyst for a change in the law, the catalyst theory for a section 1021.5 attorney award does not apply because it was the Legislature, not the Commission, that changed its behavior as a result of this lawsuit." *Marine Forests Society II,* 160 Cal. App. 4th at 871. The court acknowledged that the lawsuit was "the" catalyst for the change in law curing the separation of powers problem. The court then decided, nonetheless, that the actions of the Legislature and the Coastal Commission must be mutually exclusive, such that if the Legislature takes action, only its behavior remains relevant, "not [that of] the Commission." *Id.* The parties had no opportunity to brief or argue this issue.

REASONS FOR GRANTING THE PETITION

The California courts have incorrectly decided a federal question of procedural due process. The decision conflicts with the relevant decisions of this Court. The decision also conflicts with the decisions of the United States Courts of Appeals.

I. THE CALIFORNIA COURTS HAVE INCORRECTLY DECIDED A FEDERAL QUESTION OF PROCEDURAL DUE PROCESS BY DENYING A PETITION FOR SUPPLEMENTAL BRIEFING OR REHEARING ON A HIGHLY FACT BOUND ISSUE RAISED *SUA SPONTE* BY THE COURT OF APPEAL AT ORAL ARGUMENT AND RELIED UPON TO DECIDE THE CASE

A. Due Process Requires That Decisions Made on Highly Fact Bound Issues Accommodate, at a Minimum, Briefing And Argument on Those Issues

> [W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, *unless there is, or was, afforded to him some real opportunity to protect it.*

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 682 (1930) (emphasis added). Presently, however, when appellate courts raise issues *sua sponte*, whether fact bound or purely legal, which then become dispositive of the case, "[t]here is no apparent agreement on a practical course of action." *Compare* Sarah M.R. Cravens, *Involved Appellate*

Judging, 88 Marq. L. Rev. 251, 262 (2004-2005), *with* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245 (2001-2002). This lack of "apparent agreement" which "has not yet attracted the kind of attention that it merits," 88 Marq. L. Rev. at 297, is truly a permission slip for procedural due process violations.

"A fair adversary process presupposes both a vigorous prosecution and a vigorous defense." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 419 (1978). In public interest litigation, the prevailing party is often due his or her fees. *See* Cal. Code Civ. Proc. § 1021.5, *supra*. Without such provisions, clients and attorneys could not afford the risk of bringing claims of great constitutional import. Here, an appellate court has reversed such an attorney fee award. *In the process* of deciding to reverse the award, the courts should not constitutionally do so based on a highly fact bound issue raised *sua sponte* with no opportunity for supplemental briefing and argument. That is not the fair adversary process guaranteed by the Fifth and Fourteenth Amendments.

Whether the Legislature's actions subsequent to the litigation mooted any change in behavior by the defendant Coastal Commission is a highly fact bound issue under California state law. *See Sagaser v. McCarthy*, 176 Cal. App. 3d 288, 315 (Cal. Ct. App. 1986) (recognizing a "factual issue" for an award of attorney fees under California Code of Civil

Procedure section 1021.5 as to whether the "persistence of appellants affected the Legislature's decision" to change the law and remanding "for a factual hearing" on what attorney fees may be allowable); *see also Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 609 (2001).

"Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense – whether it has had an opportunity to present its case and be heard in its support." *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. at 681. Petitioners do not ask for review of California Government Code section 68081 requiring such a hearing or of any California state court judgments on the catalyst theory of recovering attorney fees. As in *Brinkerhoff-Faris Trust & Savings*, 281 U.S. at 677-678, petitioners ask only for a review of the denial of their petition for rehearing or supplemental briefing on a dispositive fact bound issue on which they (and respondents) had no meaningful opportunity to be heard.

B. Due Process Prohibits Courts From Using the Present Case To Create New Law and Then Apply That New Law Retroactively to the Same Case

In *Nelson*, this Court agreed with the court of appeals that "due process does not countenance such swift passage from pleading to judgment in the

pleader's favor," 529 U.S. at 465, but that due process demands "a more reliable and orderly course." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 467 (2000). This is a similar situation, except that the court of appeal has done the pleading itself and then swiftly passed judgment on that pleading. In so doing, it has suddenly created new law by those acts. *See Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673; *see also Mack v. City of Detroit*, 654 N.W.2d 563 (Mich. 2002); *see also State ex rel. Shelly Materials, Inc. v. Clark County Board of Commissioners*, 875 N.E.2d 59 (Ohio 2007) (Pfeifer, J., dissenting).

In *Brinkerhoff-Faris Trust & Savings*, the Missouri Supreme Court had similarly denied, without opinion, a petition for rehearing on a state law judgment. 281 U.S. at 677-678. There, a Missouri trial court had decided, and the Missouri Supreme Court had affirmed, that the petitioners were guilty of laches for failing to exhaust administrative remedies. *Id.* at 675-677. In reality, Missouri case law had made clear that no such remedy existed. No administrative remedy existed until the Missouri Supreme Court used *petitioners'* very case to overrule the case eliminating the administrative remedy.

Likewise here, the California court of appeal used petitioners' case to create new law on the effect of the Legislature's actions on a petitioner's claim to attorneys' fees under California Code of Civil Procedure section 1021.5. Reporter's Transcript, *supra*, at 9:9-11:13; *Marine Forests II*, 160 Cal. App. 4th at 871. The court of appeal then retroactively applied that

newly created law just as in *Brinkerhoff-Faris Trust & Savings*, precluding petitioners from ever having an opportunity to be heard on what would determine the outcome of their case. *Marine Forests Society II*, 160 Cal. App. 4th at 871. The California Supreme Court affirmed these actions, and neither the petitioners nor respondents have yet had an opportunity to be heard. App. at 21.

The California Legislature enacted Government Code section 68081, *supra*, in 1986 to ensure due process and "to prevent the courts from making new law upon grounds which none of the parties to the appeal has had the opportunity to research or address." App. at 23. The bill's sponsor, the Attorney General, cited four criminal cases in which the courts had rendered decisions based on issues not briefed or proposed by any party. In one case, the court had redefined first degree felony murder. *People v. Dillon*, 34 Cal. 3d 441 (Cal. 1983). In another, the court had changed the law of California's Proposition 8 by limiting the use of prior felony convictions for impeachment purposes to those of "moral turpitude," and without defining "moral turpitude." *People v. Castro*, 38 Cal. 3d 301 (Cal. 1985). These decisions resulted in new law without the benefit of the adversarial process, in contravention of the due process rights of the parties.

In the present case, the Court of Appeal, Third Appellate District and the California Supreme Court declined to follow Government Code section 68081. Nonetheless, it is the federal guaranty of procedural

due process which ultimately requires notice and an opportunity to be heard on dispositive issues.

C. Errors Result From Decisions Made on *Sua Sponte* Issues Without Supplemental Briefing and Argument

Errors are more likely to occur in cases decided on unbriefed *sua sponte* issues. *See* Adam A. Milani, *supra*, 69 Tenn. L. Rev. at 259-262 (explaining that in *Poyner v. Loftus*, 694 A.2d 69 (D.C. Cir. 1997), the District of Columbia Circuit chose to raise and decide the issue of what standard of care applies to disabled persons for purposes of analyzing contributory negligence, failed to discover the "white cane law" expressly abrogating the plaintiff from contributory liability and then used the contrary common law of another state to rule incorrectly against the plaintiff).

Waste of judicial resources results from the need to correct improper decisions. *See Anastasoff v. United States*, 223 F.3d 898, 905 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000). *See also Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999) (explaining that avoiding *sua sponte* decisions at the trial level saves judicial resources because *sua sponte* decisions can lead to appeals and remands). *See also Greenberg v. Comerica Bank*, 229 F.3d 1163 (Table) Nos. 98-1349, 98-1366, 95-B-663 2000 WL 1174625 at n.5 (10th Cir. Aug. 18, 2000) ("However, when, as here, a court disposes of a case on a point not argued by the parties, it is axiomatic that the

parties may challenge that ruling and the court's underlying analysis on appeal.")

Likelihood of error and waste of judicial resources increases due to issues raised *sua sponte*, which are often deliberated not much more substantially than is dicta and should therefore not control subsequent cases:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but *ought not to control the judgment in a subsequent suit* when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. State of Virginia, 19 U.S. 264, 399-400 (1821) (emphasis added).

Justice Powell revealed this type of error in *Monroe v. Pape*, 365 U.S. 167 (1961), and its correction in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). He explained that "[i]n *Monroe* and its progeny, we have answered a question that was never actually briefed or argued in this Court – whether a municipality is liable in damages for

injuries that are the direct result of its official policies." *Monell*, 436 U.S. at 708 (Powell, J., concurring).

In 1986, "the shoulders of" the California Legislature felt "the burden of the Court's own error[s]," *Monell*, 436 U.S. at 708 (Powell, J., concurring) (quoting *Girouard v. United States*, 328 U.S. 61, 70 (1946)), by deciding cases based on *sua sponte* issues without supplemental briefing and argument. To alleviate that burden, the California Legislature enacted Government Code section 68081, *supra*.

Avoiding errors and conserving judicial resources are particularly important in the subject civil litigation, where there is a complex causal determination to be made. This Court has declined to follow the catalyst theory of attorney fee awards followed in most jurisdictions because, "[a]mong other things, a 'catalyst theory' hearing would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that 'will likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct.'" *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. at 609 (citing Brief for United States as *Amicus Curiae*).

In California where the catalyst theory is followed (*see Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 560 (Cal. 2004)), the fact bound inquiry into the subjective motivations of the party or parties changing their conduct necessitates briefing and

argument. Compliance with procedural due process is important in this circumstance of applying law *to fact* where the party changing its conduct and its motivations for change are not "apparent on the face of things" like the status of a rule of law may be. *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). Otherwise, "[t]he rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *Id.*

In the present case, the court of appeal's *sua sponte* decision making absent procedural due process has resulted in a factual error and new law that significantly diminishes the value of the private attorney general doctrine as established in California. The factual error is that only the California Legislature changed its behavior in response to the litigation, when in fact, the respondent Coastal Commission changed its behavior by working *toward* and *with* the Legislature to bring the commission's structure into compliance with separation of powers. State of California Resources Agency, Enrolled Bill Report, A. 2003, 2nd Ex. Sess. More evidence of this could be presented if the court of appeal had afforded petitioners the opportunity to brief and argue the *sua sponte* issue. Again, petitioners do not ask this Court to review the factual errors themselves but to enforce the procedural due process right of the parties to address dispositive factual issues. *See Sagaser v. McCarthy*, 176 Cal. App. 3d at 315 (recognizing a

"factual issue" for an award of attorney fees under California Code of Civil Procedure section 1021.5 as to whether the "persistence of appellants affected the Legislature's decision" to change the law and remanding "for a factual hearing" on what attorney fees may be allowable). *See also Buckhannon*, 532 U.S. at 609.

There has been a change in California law without notice and a meaningful opportunity to be heard. Marine Forests should have its day in court to participate in the creation of any precedent restricting the recovery of attorneys' fees in public interest litigation. Future litigants should not bear the burden of correcting the errors of procedurally deficient unconstitutional precedent.

The adversary process will never be perfect, but there is significant need for improvement where the decision-making process is based on issues raised *sua sponte*. *See Greenlaw v. United States*, 128 S. Ct. 2559, 2575 (2008) (Alito, J., dissenting) (comparing the cross-appeal requirement for increasing erroneously calculated criminal sentences to "the rule of appellate practice that restrains reviewing courts from addressing arguments that the parties have not made," a rule which "is not inflexible," but whose boundaries remain otherwise open and undefined). *Greenlaw* affirmed a *sua sponte* error correction on behalf of the government. This is a case of *sua sponte* error *creation*. This case is among the "limitless variety of such matters that fall into a gray area at present as to whether a court may, should, or must consider [sua sponte issues]" without supplemental

briefing and argument. Sarah M.R. Cravens, *supra*, 88 Marq. L. Rev. at 266. As such, the procedural due process rights of the parties require definition.

II. THE SUBJECT DECISIONS OF THE CALIFORNIA COURTS CONFLICT WITH RELEVANT DECISIONS OF THIS COURT FOR ENSURING PROCEDURAL DUE PROCESS IN DECISIONS MADE ON *SUA SPONTE* ISSUES

A. The Relevant Decisions of This Court Indicate That Due Process Demands Supplemental Briefing on Dispositive *Sua Sponte* Issues

The general rule is "that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts." *Nelson v. Adams*, 529 U.S. at 469. This leaves open the authority of the appellate courts to raise issues as potential grounds of decision. This Court has frequently remarked on the necessity of notice and opportunity to be heard on such dispositive *sua sponte* issues.

In 1993, this Court unanimously determined that the District of Columbia Court of Appeals did not abuse its discretion in deciding an issue briefed by neither party, namely the validity of a statute which the court itself had noticed was inadvertently repealed in 1918, "*[a]fter giving the parties ample opportunity to address the issue.*" *United States National Bank of Oregon v. Independent Insurance*

Agents of America, Inc., 508 U.S. 439, 448 (1993) (emphasis added). By reverse implication, had the District of Columbia Court of Appeals not given the parties ample opportunity to address the *sua sponte* issue, a due process abuse of discretion would have been found.

Where the Fifth Circuit Court of Appeals had raised a new issue of procedural default against a prisoner's writ for *habeas corpus* and used it to render its decision against him, this Court stated: "We note that the parties might have considered these questions, and the Court of Appeals might have determined their relevance or their answers, *had that court not decided the procedural default question without giving the parties an opportunity for argument.*" *Trest v. Cain,* 522 U.S. 87 (1997) (emphasis added). Having indicated how the Fifth Circuit should have operated, this Court vacated the judgment and remanded the case.

In *Nelson*, this Court considered due process in the pursuit of attorney fee awards from the perspective of the person to pay. The issue there raised and decided by the Court of Appeals for the Federal Circuit was whether a corporation's sole shareholder could be held personally liable for an award of attorneys' fees, where the shareholder had not previously been a party. Of that situation, this Court said that the shareholder "seeks only *the right to contest on the merits* his personal liability for fees originally sought and awarded solely against [the corporation]. That right, we hold, is just what due process affords him."

Nelson v. Adams USA, Inc., 529 U.S. at 472 (emphasis added).

As in *Nelson*, petitioners here seek *only the right to contest on the merits* a dispositive basis of the court of appeal's reversal of the attorney fee award. The relevant decisions of this Court indicate that there should have been, and still can be, an opportunity for briefing and argument on such a dispositive *sua sponte* issue.

B. This Court Has a History of Declining Consideration of Issues Not Properly Raised or, Alternatively, Requesting Supplemental Briefing To Satisfy Due Process

This Court has set an example of either declining to consider unbriefed issues or requesting supplemental briefing when compelled to raise an issue *sua sponte*. It can be presumed that this Court engages in such practice to ensure procedural due process for the parties and the trustworthiness of each decision's reasoning for future cases. This practice ensures notice and opportunity to be heard on dispositive issues.

In *Ladner v. United States*, this Court declined to consider an issue regarding the scope of collateral attack on criminal sentences because it is "an important and complex one," and it "should have the benefit of a full argument." 358 U.S. 169, 173 (1958). This Court decided to wait for "another case where that

question is properly raised, and is adequately briefed and argued in this Court." *Id.; see also Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 n.1 (2001) ("We are not disposed to decide the constitutional issue whether Title II [of the ADA], which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question").

In some cases, this Court has been so cautious as to avoid deciding issues that *were* briefed and argued by the parties but were not mentioned in the opposition brief. *See Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-254 (1999) (per curiam); *South Central Bell Telephone Company v. Alabama,* 526 U.S. 160, 171 (1999); *Kolstad v. American Dental Association*, 527 U.S. 526, 553 (1999) (Stevens, J., dissenting) ("The absence of briefing or meaningful argument by the parties makes this Court's gratuitous decision to volunteer an opinion on this nonissue particularly ill advised. It is not this Court's practice to consider arguments – specifically, alternative defenses of the judgment under review – that were not presented in the brief in opposition to the petition for certiorari. *See* this Court's Rule 15.2.").

In the present case, the court of appeal would have more properly chosen to decline considering the complex causal issue of whether the Legislature's behavior mooted any change in behavior by the Coastal Commission. Instead, it should have looked to the issue presented and argued, the issue of

whether the actual party, the Coastal Commission, had changed its behavior in the manner sought by the litigation. The parties had presented nothing regarding the effect of the Legislature's participation. In fact, when Justice Scotland raised the issue of the Legislature's behavior at oral argument, the Deputy Attorney General said, "Well, to be honest, I really hadn't looked at it that way." Reporter's Transcript, *supra,* at 10:13-14. Justice Scotland further asked the Deputy Attorney General:

> **Justice Scotland:** Do you understand where I'm going with this?
>
> **Ms. Trankley:** Yes, I do.
>
> **Justice Scotland:** In a way, isn't the Legislation [*sic*] and Commission bonded together, tied together on this issue in a way for the Catalyst Theory? Could that be argued?
>
> **Ms. Trankley:** That's the argument Marine Forests would make. This is a case of first impression. . . . I think that in this particular case, you don't even have to reach that issue, . . . the important point here is that what they did wasn't of substantial public benefit.

Reporter's Transcript, *supra,* at 11:8-12:3.

The court of appeal could have raised and decided the issue of the Legislature's role in the outcome of the litigation, *but only* with supplemental briefing and argument. That is what this Court has

done in situations compelling such consideration. *See Brown v. Board of Education of Topeka*, 345 U.S. 972, 973 (1953) & *Brown v. Board of Education of Topeka*, 349 U.S. 294, 301 (1955); *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988) (per curiam); *Doggett v. United States*, 502 U.S. 976 (1991); *Allied-Signal, Inc. v. Director, Division of Taxation*, 503 U.S. 928 (1992); *Swint v. Chambers County Commissioner*, 513 U.S. 958 (1994); *Gustafson v. Alloyd Company*, 512 U.S. 1280 (1994); *Reno v. Bossier Parish School Board*, 527 U.S. 1033 (1999); *Vermont Agency of National Resources v. United States*, 528 U.S. 1044 (1999); *Dickerson v. United States*, 530 U.S. 428, 442, n.7 (2000); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1407 (2008).

Scholars have been recommending such practice for many years. *See* B.E. Witkin, *Manual on Appellate Court Opinions* § 85 (1977); *see also* Roger J. Traynor, *Badlands in An Appellate Judge's Realm of Reason*, 7 Utah L. Rev. 157, 159 (1960) ("The appellate judge, however, is usually denied this luxury of specialization as he hears conflicting sides of a controversy. Too often he does not get the help he should have had from the briefs. . . . When [the appellate court] must itself formulate the issues it then gives counsel an opportunity to submit new briefs, which they should not lightly disregard."); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 San Diego L. Rev.

1253 (2002); Adam A. Milani, *supra*, 69 Tenn. L. Rev. 245.

In *Brown v. Board of Education of Topeka*, for example, this Court ordered supplemental briefing twice. 345 U.S. 972. It invited the Attorney General of the United States to file a brief and participate in oral argument. *Id.* And after finding that segregation in the public schools is an Equal Protection violation, *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954), it asked for "the full assistance of the parties in formulating decrees" to remedy the discrimination. *Id.* The Court invited the Attorney General of the United States and the Attorneys General of the affected states to present briefs, *id.* at 496, before issuing the final order to end segregation "with all deliberate speed." *Brown v. Board of Education of Topeka,* 349 U.S. at 301.

Recently, this Court proactively sought supplemental briefing in another way. In *United States v. Dickerson*, the United States Attorney General's Office had refused to provide supplemental briefing upon the Fourth Circuit's request as to whether 18 U.S.C. § 3501 could validly supplant the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). *United States v. Dickerson*, 166 F.3d 667, 681 n.14 (4th Cir. 1999). The applicability and validity of section 3501 had been raised *sua sponte* by the Fourth Circuit upon encouragement from an amicus. *Id.* at 682. To ensure that the issue was fully argued, this Court turned to a law professor since the U.S. Attorney General's Office strangely refused to brief it.

"Because no party to the underlying litigation argued in favor of § 3501's constitutionality in this Court, we invited Professor Paul Cassell to assist our deliberations by arguing in support of the judgment below." *Dickerson v. United States*, 530 U.S. at 441, n.7.

This Court's steps in *Brown*, *Dickerson*, and numerous other cases demonstrate that procedural due process requires avoiding decisions based on issues raised *sua sponte* by the court without supplemental briefing and argument. Here, petitioners were fully prepared to submit supplemental briefing, sought to invoke the right to do so, and were denied. Such action is inconsistent with this Court's practice of procedural due process and should be reviewed under the Fifth and Fourteenth Amendments.

C. Where This Court *Has* Decided a Case Based on an Unbriefed *Sua Sponte* Issue, Strong Dissenting Opinions Have Always Argued That Procedural Due Process Demanded More

In contrast to the dominant and emerging practice embodied in *Garrett* and *Dickerson*, there are a handful of dissenting opinions in cases this Court has decided based on an issue not briefed by the parties.

Each dissenting opinion expresses the same procedural due process concerns of fairness and accuracy presented formally for this Court's review today. *See Erie Railroad Company v. Tompkins*, 304 U.S. 64, 87-88 (1938) (Butler, J., dissenting) ("[T]he

Court should move cautiously, seek assistance of counsel, act only after ample deliberation, [and] show that the question is before the Court," before overruling *Swift v. Tyson*, 41 U.S. 1 (1842). Justice Butler further noted that there was protest from those who joined in the opinion, and that "[i]t may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it."); *see also Mapp v. Ohio*, 367 U.S. 643, 673-676 (1961) (Harlan, J., dissenting) (Justice Harlan pointed out that Ms. Mapp had not raised the issue of overturning *Wolf v. Colorado*, 338 U.S. 25 (1949), but had only argued her First Amendment rights of free thought and expression. Justice Harlan further remarked, "[t]he occasion which the Court has taken here is in the context of a case where the question was briefed not at all and argued only extremely tangentially"); *see also Greer v. Miller*, 483 U.S. 756, 775 (1987) (Brennan, J., dissenting) ("The Court has overturned the judgment below, and upset the settled practice of the lower courts, on a point which the State conceded below and did not raise here, and on which respondent has had no opportunity to be heard"); *see also Kolstad*, 527 U.S. at 553 (Stevens, J., concurring in part and dissenting in part) ("[T]o the extent that the Court tinkers with the Restatement's standard, it is rejecting the Government's view of its own statute without giving it an opportunity to be heard on the issue"); *see also Small v. United States*, 544 U.S. 385, 400-401 (2005) (Thomas, J., dissenting).

These dissents highlight the procedural due process problems inherent in decisions made on dispositive *sua sponte* issues without supplemental briefing and argument. The emerging dominant trend running from *Brinkerhoff* to *Ladner*, through *Brown, Garrett, Dickerson*, the correction of *Monroe* in *Monell*, and the majority of recent cases requiring supplemental briefing is ripe for consideration as a rule, not merely an optional practice, of procedural due process.

III. THE SUBJECT DECISIONS OF THE CALIFORNIA COURTS AND OTHER STATE COURTS CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS

A. The United States Courts of Appeals Remand the Case or Request Supplemental Briefing and Argument on Dispositive Issues Raised *Sua Sponte*

Several courts of appeals will remand a case where a dispositive issue is raised *sua sponte*. *See United States v. McHan*, 11 Fed. Appx. 304, 308 n.* (4th Cir. 2001); *Lani v. McDaniel*, 23 Fed. Appx. 644, 644-645 (9th Cir. 2001); *Snider v. Melindez*, 199 F.3d 108, 111; *University of the District of Columbia Faculty Association v. District of Columbia Financial Responsibility Mgmt. Assistance Auth.*, 163 F.3d 616, 625 (D.C. Cir. 1998); *see also Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th at 560-561 ("Because these limitations on the catalyst theory are to some degree new

and were not addressed by the parties or the trial court, we remand for reconsideration of the trial court's award of attorney fees in this case").

Alternatively, courts of appeals will request supplemental briefing and argument on issues raised *sua sponte*. *See Thomas v. Crosby*, 371 F.3d 782, 802 (11th Cir. 2004) (Tjoflat, J., specially concurring); *Providence Journal Company v. Providence Newspaper Guild*, 271 F.3d 16, 19 (1st Cir. 2001); *United States v. Young*, 266 F.3d 468, 475 n.8 (6th Cir. 2001); *Mentor H/S, Inc. v. Medical Device Alliance, Inc.*, 244 F.3d 1365, 1373 (Fed. Cir. 2001); *Kuhai v. INS*, 199 F.3d 909, 913-914 (7th Cir. 1999).

Requests for supplemental briefing do not always result in the submission of briefs by the parties, but the opportunity to be heard was nonetheless provided. *See Smith v. Roper*, 12 Fed. Appx. 393, 395-398 (7th Cir. 2001); *United States v. Dickerson*, 166 F.3d at 697 (Michael, J., dissenting) ("We perform our role as neutral arbiter best when we let the parties raise the issues, and both sides brief and argue them fully. That did not happen here"), *rev'd*, *Dickerson v. United States*, 530 U.S. 428. *See also United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. at 448.

At least three courts of appeals have not requested but ordered supplemental briefing as a matter of due process. *See Shaboon v. Duncan*, 252 F.3d 722, 737 (5th Cir. 2001); *Kee v. City of Rowlett, Texas*, 247 F.3d 206, 217, n.21 (5th Cir. 2001);

Prudential Insurance Company of America v. Athmer, 178 F.3d 473, 477 (7th Cir. 1999) ("[W]e do not reverse judgments in civil cases on the basis of grounds not argued by the appellant at any stage of the litigation – grounds, therefore, that the appellee had no opportunity to meet."); *Walsh v. International Longshoremen's Association*, 630 F.2d 864, 867 (1st Cir. 1980).

By neither remanding the case nor receiving supplemental briefing on dispositive *sua sponte* issues, the procedural due process standards of the California Courts are in stark conflict with those of the United States Courts of Appeals.

B. The United States Courts of Appeals Conflict With the State Supreme Courts Which Do Not Uniformly Remand or Request Supplemental Briefing on Dispositive *Sua Sponte* Issues

At least two states have rules regarding issues raised *sua sponte*. *See* Cal. Govt. Code § 68081, *supra*. *See also* Wash. Rule 12.1(b) App. Proc. In Washington, it is "the rare case" that an issue is decided without supplemental briefing because "briefing is not necessary to full and fair resolution of the issue." *State of Washington v. Aho*, 975 P.2d 512, 514 (Wash. 1999). The one example given is where "the issue is a purely legal one." *Id.*

However, state courts are generally not committed to providing procedural due process on dispositive *sua sponte* issues. *See Bloomer v. Gibson*, 912 A.2d 424, 431 n.4 – 436 (Vt. 2006) (Dooley, J., writing the

majority opinion, and Teachout, J., dissenting). In *Bloomer*, the dissent asserted that the majority "decide[d] the case on an alternative rationale raised *sua sponte* by the Court." *Id.* at 433. The majority stated a preference for the position taken by Sarah M.R. Cravens, *supra*, 88 Marq. L. Rev. 251, while the dissent preferred the higher procedural due process standards of Adam A. Milani, *supra*, 69 Tenn. L. Rev. 245. The dissent remarked that "[e]ven Cravens, who argues that judges should not be limited to the arguments raised in the briefs on appeal, recognizes that inviting supplemental submissions by the parties may be warranted where 'there is an omitted issue or an argument that might be dispositive or highly influential in the decision.'" *Id.* at 435-436, citing Sarah M.R. Cravens, *supra*, 88 Marq. L. Rev. at 296.

See also Mack v. City of Detroit, 654 N.W.2d 563. "The opinion [of the lower court] was issued without affording plaintiff any opportunity to brief or argue a dispositive issue, i.e., which party carries the burden of pleading sovereign immunity, raised for the first time by this Court on issuance of the opinion. Neither was the plaintiff afforded any opportunity to brief or have a fair chance to respond to a second dispositive issue, i.e., the applicability of the government tort liability act." *Id.* at 566. Chief Justice Corrigan concurred with the majority, distinguishing this case from a previous one in which the plaintiff *had* been "sandbagged by the Court." *Haji v. Prevention Ins. Agency, Inc.*, 492 N.W.2d 460 (Mich. Ct. App. 1992).

See also State ex rel. Shelly Materials Inc. v. Clark County Board of Commissioners, 875 N.E.2d 59. The issue raised *sua sponte* was whether the plaintiff's "sand and gravel interests in its property are not severable as separate property interests *because the deed did not specify a transfer of mineral rights alone*, but transferred fee simple . . . (Emphasis added)." *Id.* at 71 (Pfeifer, J., dissenting). As in *Mack* and as in *Brinkerhoff-Faris*, the *sua sponte* issue and decision caused the overruling of prior law and retroactive application of the resulting law without an opportunity to be heard. Where a party "could not have reasonably foreseen" that the court would limit a prior holding and thereby change the applicable law, the dissent argued that procedural due process required supplemental briefing or a remand of the case. *Id.* at 71-72 (Pfeifer, J., dissenting).

See also Bartus v. Wisconsin Department of Health and Social Services, 501 N.W.2d 419 (Wis. 1993). "That the court of appeals has the authority to dismiss an appeal *sua sponte* without the benefit of additional briefing is clear. In respect to the instant case, however, we conclude that the court of appeals wrongly dismissed the action on the basis of an erroneous interpretation of [the statute.]" *Id.* at 421. Ironically, the majority reversed and remanded the case because the lower court erroneously applied its *sua sponte* statutory interpretation. This is another example of wasting judicial resources and risking erroneous precedent because the parties had to file an appeal to have the opportunity to address the new

statutory interpretation applied to their case without notice.

See also Jackson v. Benson, 647 N.W.2d 815, 817 (Wis. 2002) (Abrahamson, C.J., dissenting); *State v. Harvey*, 647 N.W.2d 189, 204 (Wis. 2002) (Abrahamson, C.J., dissenting); *Beecher v. Labor & Industry Review Commission*, 682 N.W.2d 29, 48 (Wis. 2004) (Abrahamson, C.J., concurring); *Maurin v. Hall*, 682 N.W.2d 866, 892 (Wis. 2004) (Abrahamson, C.J. and Crooks, J., concurring); *City of Janesville v. CC Midwest, Inc.*, 734 N.W.2d 428, 449 (Wis. 2007) (Bradley, J. and Abrahamson, C.J., concurring).

CONCLUSION

This procedural due process problem merits this Court's attention. The California courts have decided that procedural due process does not require notice or opportunity to be heard on a highly fact bound issue when that issue is raised by the court *sua sponte* and then used to decide the case. This decision and the practice of most state courts conflict with the relevant decisions of this Court, and conflict with the decisions of the United States Courts of Appeals. It is respectfully requested that this Court grant certiorari to consider the issue presented and to order a rehearing with supplemental briefing and argument on the subject action.

DATED: September 9, 2008.

Respectfully submitted,

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IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

MARINE FORESTS SOCIETY et al,
Plaintiffs, Respondents and Cross-Appellants,
v.
CALIFORNIA COASTAL COMMISSION,
Defendant, Appellant, and Cross-Respondent.

C052872
Sacramento County
No. 00AS00567

(Filed Mar. 24, 2008)

BY THE COURT:

Plaintiffs' "Request to Submit Supplemental Briefing or, in the Alternative, Petition for a Rehearing" is denied.

Dated: March 24, 2008

SCOTLAND, P.J.

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SUPERIOR COURT FOR THE
STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

MARINE FORESTS SOCIETY, a nonprofit corporation, and RODOLPHE STREICHENBERGER, an individual and taxpayer, Plaintiffs, v. CALIFORNIA COASTAL COMMISSION, a state agency; and DOES 1 through 50, inclusive, Defendants.	Case No. 00AS00567 Complaint filed: 1/31/00 First Amendment: 5/10/00 Second Amendment: 8/31/00: ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER ON MOTION FOR ATTORNEY FEES AND GRANTING IN PART PLAINTIFFS' MOTION FOR AWARD OF REASONABLE ATTORNEYS' FEES Dept: 53 The Hon. Loren McMaster (Filed May 1, 2006)

This matter came on regularly for hearing pursuant to the Motion for Award of Reasonable Attorneys' Fees of Plaintiffs Marine Forests Society and Rodolphe Streichenberger (collectively Marine Forests) filed on September 30, 2005. Marine Forests' motion was heard on November 30, 2005, and taken under submission. On January 31, 2006, in the Court's Ruling On Matter Taken Under Submission on November 30, 2005, the Court awarded Marine Forests its appellate fees, but denied it its trial fees and fees incurred for public relations activities. The Court also ordered Plaintiffs to file a revised statement of hours deleting all pre-appeal trial and public relations activities. On February 14, 2006, Plaintiffs filed the Revised Statement of Hours.

On or about February 23, 2006, Defendant California Coastal Commission (Coastal Commission) filed its Objections to Marine Forests Society's Revised Statement of Hours. On or about February 23, 2006, the Coastal Commission also filed its Motion for Reconsideration of Order on Attorney Fees. On April 4, 2006, the Court in its tentative ruling denied the Coastal Commission's motion for reconsideration. The tentative ruling became the order of the Court, as Marine Forests was not advised by 4:00 p.m. the day before the scheduled hearing that oral argument was requested.

The Court having considered all the pleadings filed by the parties in this matter makes the following order.

I. Motion for Reconsideration

Defendant's motion for reconsideration is denied. There has been no compliance with CCP section 1008 since defendant has pointed to no new facts, circumstances or law that was not available at the time of the hearing. Hence, the motion for reconsideration must be denied. *Le Francois v. Goel* (2005) 35 Cal.4th 1094.

The Court's reasoning in ruling on the motion for attorney fees was based squarely on the issues presented by the parties. The Court did not raise any new circumstances as contended by Defendant. At the hearing, Defendant failed to present evidence regarding the penalties, despite it having the opportunity to do so. The evidence it seeks to present now was obviously available at the time of the hearing. Defendant offers no reasonable excuse for not presenting it at that time.

After the Court of Appeal issued its opinion denying plaintiff's motion for attorney's fees, plaintiff sought leave to present evidence that the Court had found lacking. The Court of Appeal denied plaintiffs request to present such additional, and arguably relevant, evidence. The same result must apply here to deny defendant's effort to present new evidence after the hearing on the matter has been held.

II. Motion for Attorney Fees

The Court vacates its prior ruling on the attorney fee motion (ruling on submitted matter) and now rules as follows.

Marine Forests' motion for attorney fees is granted in part and denied in part.

A. Request for Fees incurred in the Original Trial Court Proceedings

Insofar as the motion pertains to the fees for the trial court proceedings prior to the appeal, it is denied. Marine Forests seeks fees pursuant to CCP 1021.5. Where a prior appellate opinion expressly ruled on a party's entitlement to attorney fees, the trial court is bound by principles of "law of the case" to follow the appellate court's expressions on the subject. See *Benson v. Greitzer* (1990) 220 Cal.App.3d 11, 14.

Here, the Court of Appeal has already determined that plaintiff is not entitled to private attorney general fees for the trial court element of this action. The Court based its denial of fees on its determination that Marine Forests had not produced evidence to satisfy the second prong of the section 1021.5 requirements – that [sic] that the necessity and financial burden of private enforcement outweighed its personal stake in the litigation. The Supreme Court denied plaintiff's petition for review of the attorney fee issue. The appellate decision is now final.

In the circumstances, the Court must conclude that the appellate decision is law of the case with respect to the request for fees in the trial court proceedings.

The Court is not persuaded that Judge Kobayashi's award is properly characterized as an "interim" fee award that somehow negates the doctrine of law of the case. In reversing the trial court's fee award, the Court of Appeal indicated that the additional causes of action in the underlying complaint had been rendered moot by its order that the Commission lacked the authority to issue a cease and desist order. It also refused to address the question of whether the award was premature. In any event, Code of Civil Procedure section 1021.5 attorney fees are awardable to the successful party. It is highly unlikely that an interim award would even be proper. Marine Forests' reliance on *Bell v. Farmer's Insurance* (2001) 87 Cal.App.4th 805 is misplaced. The reference to the possibility of interim fees awards under section 1021.5 is pure dicta. In any event, the *Bell* court pointed out that there was no decisional law in California supporting such an award. The fee award was sought, and granted, at the conclusion of the trial court action. It was not an "interim" award.

B. Request for Fees Incurred on Appeal

The law of the case doctrine applies to any ruling in an appellate court opinion that was necessary to its decision. *Clemente v. State of California* (1985) 40 Cal.3d 202, 211-212. Here, the issue of fees to defend

the trial court's decision at the appellate level was not before the Court of Appeal. Such fees had not yet been totally incurred. Thus, the law of the case doctrine does not apply to this Court's consideration of the fees incurred in the appellate courts. This is not to say, however, that this Court may decide this matter without reference to the appellate court's reasoning.

In its unpublished decision, the Court of Appeal applied well-established law to the facts of this case. The Court pointed out that Marine Forests had the burden to prove that it met the relevant criteria for an award of 1021.5 fees. The Court agreed with the Commission's argument that Marine Forests had not demonstrated that the necessity and financial burden of private enforcement outweighed its personal stake in the litigation. The Court's decision was based on the state of the record in the trial court. The appellate court emphasized that even after the Commission raised the issue in the trial court, Marine Forests failed to address the manner in which the issue in the trial court, Marine Forests failed to address the manner in which the financial burden of pursuing the litigation outweighed its personal stake in maintaining its artificial reef and avoiding penalties. The Court determined Marine Forests' primary objective in bringing this litigation was to prevent the Commission from ordering it to remove its artificial reef or to pay monetary penalties for its failure to do so. The inability of Marine Forests to obtain the necessary permits to construct its artificial reefs and the

impending removal of its artificial reef threatened its very existence.

According to the Court of Appeal, Marine Forests raised every conceivable theory, including the separation of powers argument, to prevent this from occurring. It also sought damages for violation of its civil rights. The Court of Appeal found that Marine Forests presented no cognizable evidence to support a finding that the litigation transcended its financial interest in the outcome and imposed a financial burden disproportionate to its individual stake in the matter. Under these circumstances, the Court found that an award of public interest attorney fees was not needed to encourage Marine Forests to raise the separation of powers issue.

The Court of Appeal's decision was premised, in part, on the fact that the cease and desist order had been vacated by its decision. This, however, is no longer the case.

The Supreme Court has determined the Coastal Commission passes constitutional muster following the legislative changes that resulted following the Superior Court's decision in this case. The Court held that even assuming the trial court and the appellate court were correct in determining that the prior version of the Coastal Act provisions governing the composition and tenure of the members of the Coastal Commission violated the separation of powers clause of the California Constitution, past actions of the Commission could not be challenged on that ground.

Thus, the Supreme Court declined to invalidate the Coastal Commission's prior orders, including those that applied to Marine Forests. The trial court injunction was vacated. Marine Forests is again subject to the cease and desist order. Marine Forests has, in fact, obtained no pecuniary benefit.

As noted above, this case is now in an entirely different posture following the Supreme Court's decision. Resolution of the separation of powers issue is now final. Marine Forests has brought a motion alleging new facts and circumstances for fees that were not previously adjudicated.

Faced with a different record, this Court believes that it has both the duty and the discretion to consider the new facts in light of existing law. The test for an award of attorney fees under section 1021.5 is unchanged.

"Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or non pecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." CCP section 1021.5.

In this Court's opinion, Plaintiff has submitted admissible evidence to satisfy all three prongs of section 1021.5.

1. Enforcement of an Important Right Affecting Public Interest

The Court is persuaded that the statutory changes to the Coastal Commission triggered by this lawsuit resulted in the enforcement of an important constitutional right that conferred a significant benefit the public at large.

It should be obvious that a lawsuit that results in the elimination of a statute that violated the Constitution concerns an important right that affects the public interest. Indeed, the law has been for nearly 30 years that a" determination that the public policy vindicated is one of constitutional stature . . . establishes the first of the three elements requisite to the award (i.e., the relative societal importance of the public policy vindicated)." *Serrano v. Priest* (1977) 20 Cal.3d 25, 46, footnote 18. See also *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158 (vindicating private property interests); *Daniels v. McKinney* (1983) 146 Cal.App.3d 42 (exercise privileges for jail inmate are important rights affecting the public interest).

Following the lead of the California Supreme Court, this Court determines that Plaintiffs conferred a substantial benefit on the public at large when its lawsuit caused new legislation that cured

the constitutional infirmity it exposed. *Folsom v. Butte County Association of Governments* (1982) 32 Cal.3d 668, 684 (substantial benefit to the public is implicit when a lawsuit leads to the implementation of fundamental legislative policy). While the prior decisions of the Coastal Commission may not have been shown to be arbitrary or capricious, they were still rendered by a body that was illegally constituted. Plaintiff's efforts changed that and ensured that future decisions will be rendered by a body whose composition does not run afoul of the Constitutional Separation of Powers requirement.

Notwithstanding the dismissal of the case as being moot due to curative legislation being enacted, it is clear that Plaintiff's lawsuit was the catalyst for such change. Under such circumstances the Plaintiff is the prevailing party for the purpose of a 1021.5 fee award. *Folsom v. Butte County Associations of Governments*, supra, 32 Cal.3d 668 (whether attorneys' fees are awarded depends on the "impact of the action" and not necessarily on the decision on the merits). A significant goal of the litigation was to ensure that the composition of the Coastal Commission complied with the separation of powers doctrine. Marine Forests achieved that result. It is the prevailing party for purposes of a 1021.5 fee award.

The requirements of the first prong have bee[n] satisfied here.

2. Necessity and Financial Burden of Private Enforcement

Applying the analysis of the Court of Appeal, the question before this Court, at this time, is whether Marine Forests has met its burden of proving that the litigation was necessary and imposed a financial burden on the plaintiff that was out of proportion to the plaintiffs individual stake in the matter.

Plaintiff has established the need for private, as opposed to public, enforcement. When a lawsuit is brought against government agencies, as is the case here, the need for private enforcement is obvious. *Woodland Hills Residents Association v. City Council* (1979) 23 Cal.3d 917. Further, as the Court of Appeal has noted, the absence of a public advocate satisfies the need for private enforcement requirement. *City Sacramento v. Drew* (1989) 207 Cal.App.3d 1287.

The financial burden of private enforcement criterion is met "when the costs of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on plaintiff out of proportion to his individual stake in the matter. *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 89 (Citations omitted.) An assessment of this criterion involves a realistic and practical comparison of the litigant's personal interest with the costs of the suit.

Here, Marine Forests claims that the costs of the suit overall are in the realms of $265,000 and, for the court of appeal, $128,283 in fees. The Court notes

that out-of pocket expenses are not recoverable as fees and the appellate court directed each party to pay its own costs. The entire appellate action concerned the trial court's decision on the separation of powers issue, no other claim was before the court of appeal.

Based on the previous record, the appellate court identified Marine Forests' primary objective as "preventing the Commission from ordering it to remove its artificial reef or to pay monetary penalties for failure to do so." Marine Forests presented no evidence in the first trial court proceedings to support the necessary finding that the litigation transcended its financial interest and imposed a financial burden disproportionate to its individual stake. The Court of Appeal deemed that the absence of such evidence in the record was fatal to the attorneys' fees claim.

In its present motion for attorneys' fees Marine Forests has produced the declaration of Rodolphe Streichenberger that the reef was formed by volunteers out of inexpensive recycled materials. It would cost no more than $26,300 for the reef to be professionally removed. Insofar as these proceedings are concerned, Marine Forests has now presented evidence in the trial court to support the necessary finding that the litigation transcended its financial interest in this outcome and imposed a financial burden disproportionate to its individual stake in the matter. *Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 691.

There is no evidence that plaintiff has refused to remove the reef, thus, there is no evidence that plaintiff will necessarily be subject to penalties in any amount. There is also no evidence that Marine Forests will cease to exist if it is forced to remove the reef.

As noted above, the Supreme Court declined to invalidate prior orders of the Coastal Commission. The injunction previously obtained by Plaintiff has been dissolved. Thus, it has not and will not obtain any monetary benefit from its litigation that resulted in the elimination of the unconstitutional composition of the Coastal Commission. What Marine Forests had at stake when it commenced this litigation is the $26,300 that it would have expended had it been unsuccessful. This amount does not even come close to the attorneys fees expended in litigating this case. Applying the analysis called for in *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, the second prong has clearly been satisfied since "the expected value of the litigant's own monetary award [does not] exceed by a substantial margin the actual litigation costs." 188 Cal.App.3d at 9. Here, the expected value not only does not exceed the actual litigation costs, it is but a small fraction of such.

On this record, Plaintiff's stake cannot be viewed as other than grossly disproportionate to the litigation costs incurred in protecting the trial court's determination that the separation of powers doctrine was adversely implicated. See *Woodland*

Hills Residents Association v. City Council, supra, 23 Cal.3d at 941; *City of Sacramento v. Drew, supra*, 207 Cal. App. 3d 1287. Even if plaintiff was initially motivated by its own economic interests, it is still entitled to recover fees based on its showing that the cost of the litigation is far beyond its individual stake and satisfying the other prongs of 1021.5. *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213. The critical inquiry is whether plaintiff "had an individual stake that was out of proportion to the costs of the litigation." *Id.*, 181 Cal.App.3d at 231. See also *Gregory v. State Board of Control* (1999) 73 Cal.App.4th 584 (costs of litigation greatly exceeded plaintiff's financial interest) and *Christensen v. Superior Court* (1987) 193 Cal.App.3d 139 (although plaintiff had a financial interest in the outcome, the amount was insufficient to justify the cost of the action).

Marine Forests has produced evidence demonstrating that the requirements of the second prong have been met.

3. Fees Should not be Paid out of Recovery

The third element has been satisfied since it is undisputed that there was no recovery here from which fees could be paid.

C. Request for Fees Incurred in Presenting this Fee Petition

Marine Forests, as the prevailing party, is entitled to fees for time spent preparing and litigating the fee application. *Serrano v Unruh* (1982) 32 Cal.3d 621. The court awards fees for such work done with regard to the instant motion. Since the prior fee award was reversed, the Court deems that it is precluded from awarding fees for work done on the previous fee application in the trial court.

D. Determination of Lodestar

The Court finds the hourly rates requested by plaintiff to be reasonable. The Court is of the opinion that only time directly involved in litigating the matter in the appellate courts is recoverable, as well as time reasonably spent in the preparation of this motion for attorney fees. The Court has considered the declarations submitted regarding hourly rates for counsel of Mr. Zumbrun's skill and experience (Diepenbrock and Caso declarations), as well as its own experience in reviewing declarations in other cases concerning proper hourly rates in this market for attorneys of comparable skill and experience. The Court finds that the hourly rate of $300 per hour charged by Mr. Zumbrun to be the proper lodestar hourly rate.

The Court has considered plaintiffs amended statement that has set forth in detail the work performed and the amount charges for the services that

are the subject of this fee petition. The Court has also considered defendant's objections to the fee request. The Court sustains the Attorney General's objections to the $40,464.00 amount for fees for the unsuccessful fee application in the initial trial court proceedings and the $4800.00 amount charged for "press inquiries." The Court finds that fees are not properly awarded for such services. This Court is of the view that the Court of Appeals opinion precludes awarding fees for the fee application presented in the initial trial court proceedings. The Court is also of the view that responding to press inquiries, making speeches, and conducting related public relations activities were not necessarily performed and did not relate directly to the litigation of the constitutional issue. After deducting such amounts, the Court approves the remaining hours set forth in the fee application and total fees in the amount of $107,474.50. To this amount, the Court adds the amount of $10,400.00 for work done responding to the Attorney General's motion for reconsideration and replying to the Attorney General's opposition to the fee motion as set forth in Marine Forest's opposition to motion for reconsideration. The Court finds that fees in the amount of $117,874.50 constitute the lodestar.

E. Adjustments to the Lodestar

Both parties request that there be an adjustment to the lodestar; the defendant seeks a downward adjustment and the plaintiff seeks the application of a multiplier of at least 2.0. The Court has reviewed

those matters that must be considered before the lodestar can be adjusted and has determined that the appropriate disposition is to apply a multiplier of 1.5 to the lodestar.

The Court finds based on its review of the record in this case that the issues presented by this litigation were both novel and complex, and the matter was skillfully litigated against very competent counsel. These matters are properly considered in determining the applicability of a multiplier. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132. See also *Edgerton v. State Personnel Board* (2000) 83 Cal.App.4th 1350, 1363 (upholding a 1.5 multiplier based in part on the novelty and difficulty of the issues and the skill displayed in overcoming strong opposition). The Coastal Commission had been in existence of many years constituted in such a manner that violated the Separation of Powers Clause of the Constitution. The Court deems the issue novel since, despite the actions of the Coastal Commission having been heavily litigated, no one successfully raised the point prior to Plaintiff's counsel here. Constitutional litigation involving how government is constituted is by its very nature complex. In order for a litigant raising such issues to be successful, he or she must overcome the natural reluctance of the courts to upset the status quo, and convince the judges who hear the matter that the way that a governmental agency has always been constituted should be declared unconstitutional. The Courts always construe statutes in a manner that will avoid a determination of unconstitutionality.

Deference is usually accorded Legislative enactments. The lawsuit was defended by the Attorney General, who has deep and broad experience in defending both state agency actions and legislative enactments. Plaintiff's papers show that its counsel litigated the matter with great skill.

In summary, an enhancement to the lodestar is appropriate since the issues here were complex, success was uncertain, and competent and resourceful counsel from the Attorney General's Office fought plaintiff on virtually every point. *Kern River Pub. Access Commission v. City of Bakersfield* (1985) 170 Cal.App.3d 1205, 1228 (citing such factors as justifying a multiplier of more than 1.5). See also *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78 (2.34 multiplier held appropriate given the novel and complex issues presented and the results obtained); *Salton Bay Marina, Inc. v. Imperial Irrig. Dist.* (1985) 172 Cal.App.3d 914 (difficulty of litigation is proper factor to consider when applying a multiplier); *Wing v. Asarco, Inc.* (9th Cir. 1997) 114 F.3d 986 (multiplier of 2.0 deem appropriate for high quality of representation achieving exceptional results).

Conclusion

Applying the multiplier of 1.5 to the lodestar of $117,874.50, the Court awards attorneys fees to Plaintiff pursuant to CCP section 1021.5 in the amount of $176,811.75, an amount that the Court

finds reasonable for services performed in the appellate courts in vindicating the California Constitution's requirement of separation of powers so that one branch of government does not seize and exercise the powers of a co-equal branch.

DATED: MAY – 1 2006

/s/ **LOREN E. McMASTER**
THE HON. LOREN E. MCMASTER
Judge of the Superior Court

APPROVED AS TO FORM.

LISA TRANKLEY
Attorneys for Defendants

Court of Appeal, Third Appellate District
No. C052872
S162531

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Jun. 11, 2008)

MARINE FORESTS SOCIETY et al.,
Plaintiffs and Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant and Appellant.

The petition for review is denied.

/s/ GEORGE
Chief Justice

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1985-86 Regular Session

SB 2321 (Petris)
As introduced
Government Code
ALB

COURTS: APPELLATE REVIEW: REHEARING

HISTORY

Source: Attorney General

Prior Legislation: None

Support: State Public Defender

Opposition: Individual Justice of Court of Appeals; Judicial Council

(THIS ANALYSIS REFLECTS AUTHOR'S AMENDMENTS TO BE OFFERED IN COMMITTEE.)

KEY ISSUE

SHOULD A DECISION BE VACATED AND A REHEARING GRANTED UPON THE PETITION OF ANY PARTY TO THE PROCEEDING FILED WITHIN THE TIME LIMITS PRESCRIBED BY LAW OR RULES OF COURT WHENEVER THE SUPREME COURT, A COURT OF APPEAL, OR THE APPELLATE DEPARTMENT OF A SUPERIOR COURT RENDERS A DECISION BASED UPON A RULE OR THEORY OF LAW WHICH WAS NOT PROPOSED BY ANY PARTY TO THE PROCEEDING?

PURPOSE

Current law establishes the appellate and original jurisdiction of the Supreme Courts and courts of appeal, and the appellate jurisdiction of the superior court.

This bill would provide that a rehearing should be granted upon the petition of any party to the proceeding whenever an appellate decision is rendered based upon a rule of law which was not proposed by any party to the proceeding.

The purpose of this bill is to prevent the courts from making new law upon grounds which none of the parties to the appeal has had the opportunity to research or address.

COMMENT

1. Sponsor argues that appellate courts should not decide cases upon grounds about which none of the parties received notice

   The Attorney General's Office – sponsor of this bill – explains its position as follows. Occasionally an appeals court may on its own wish to address a theory or question of law which neither party to the action anticipated. In such circumstances it is customary for the court to solicit supplemental briefing and argument on the new point. However, there is no express requirement in the constitution, statute, case law or rules of court that the parties even be given notice, let alone an opportunity to be heard, on new issues

which the court itself wishes to use their case to address.

The following cases were cited by the sponsor as illustrations of the problems addressed by this bill, i.e., the court deciding issues without notice, research or comment by either party:

- *People* v. *Castro* (1985) 38 C3d 301: the court ruled that the provision of Proposition 8 which declares that any prior felony conviction may be used in subsequent criminal proceedings for impeachment or sentencing "without limitation" is limited to crimes involving "moral turpitude" but did not define this new standard (thus it is left to "subsequent decisions to determine which crimes are covered on a case-by-case basis over decades to come");

- *People* v. *Dillon* (1983) 150 CA3d 455 [sic]: first degree "felony murder" redefined;

- *People* v. *Lee* (1984) 150 CA3d 455: residential burglary declared not to be a "serious felony" for purposes of Penal Code Sections 667 and 1192.7 when the only issue before the court was one of ex post facto application of the statute (request for rehearing denied);

- *People* v. *Agee* (1977) 1 Crim. A015221: criminal conviction reversed based upon a denial of federal due process when the only issue raised was the right of confrontation (request for rehearing denied, but Supreme Court orders depublication).

The sponsor argues that the practice of appellate courts deciding an issue on which the parties have not been given notice and an opportunity to be heard is a violation of basic due process.

It is joined in this argument by the Office of the State Public Defender – a proponent of this bill – which stated that it "strongly supports the principle that the parties to an appeal should be afforded an opportunity to brief, or at least orally argue the determinate issue before the appellate court" renders its opinion. They feel that this bill would correct the asserted problem by providing that no court shall decide a case upon an issue or theory of law without first giving the parties involved a chance to be heard on that issue, either in writing or at oral argument.

2. Opponents state that bill is vague and addresses nonexistent problem

Although the California Association of Judges has not formally taken a position on this bill, the Appellate Courts Committee of that body is expected to recommend an opposed position. A justice on that committee informed staff that they believe the bill to be defective in two respects. One defect lies in the rehearing provision which seems to require a rehearing even if the court gives notice. At any rate, they contend that the practice of appellate courts notifying both sides of issues the courts consider significant is widespread. Such notice is given either at oral argument or before hand in writing. Accordingly notice is not a problem.

The other defect is the vagueness and ambiguity inherent in the terms "rule of law" and "theory of law." These terms would create uncertainty for the courts with regard to whether a recent case could be used as authority, for instance, or as to what precisely are the grounds on which a rehearing should be granted under this provision.

3. <u>There does not appear to be a separation of powers issue</u>

Article 3, Section 3 of the California Constitution provides for the separation powers between legislative, executive, an judicial department's of government, and states in effect that one cannot exercise or interfere with the functions of either of others. As an example, the Legislature cannot exercise or place limitations upon judicial powers such as the courts inherent power to punish for contempt. *In re McKinney* (1968) 70 C2d 8, 10. On the other hand the Legislature may regulate the procedure to be followed in punishing for contempt. *Briggs* v. *Superior Court* (1931) 211 C 281, 289.

Thus, with respect to the provision of this bill, the Legislature would not be placing a limitation on the courts' power to render a decision; it would simply be regulating the procedure to be followed by requiring the specified notice and opportunity to be heard.

* * *